BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 6

IN THE MATTER OF:	)	
	)	
UNITED STEELWORKERS, AFL-CIO, CLC,	)	
	)	
Union,	)	
	)	
and	)	CASE NO. 6-RD-172983
UNIFIRST CORPORATION,	)	
	)	
Employer,	)	
	)	
And	)	
	)	
HOMER J. SUMAN, AN INDIVIDUAL	)	
	)	
Petitioner	)	
	)	

UNION'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND RECOMMENDATION TO GRANT OBJECTIONS TO ELECTION AND ORDER A NEW ELECTION

Respectfully submitted on this
3d day of February, 2017

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STATEMENT OF THE CASE

Pursuant to 102.67(b) and (c) of the National Labor Relations Board Rules and Regulations and the January 20, 2017 Regional Director's Supplemental Decision and Certification of Results of Election in this matter ("Regional Director's Decision"), the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC ("Union") hereby requests review of the Regional Director's Decision. The Board should grant review because the record in this case clearly establishes that the Company's conduct during the critical period before the election interfered with the employees' rights to a free and uncoerced election.

SUMMARY OF ARGUMENT

The record in this case clearly establishes that the Company unlawfully interfered with the employees' rights to a free and uncoerced election. Specifically, upper management made promises and threats to bargaining unit employees, while the Company instituted policy changes affecting communication around the upcoming election. The Regional Director's Decision neglected to consider important facts in the record establishing these violations. Therefore, the National Labor Relations Board ("Board" or "NLRB") should review the Regional Director's Decision, grant the Union's objections to the election, and order a new election.

PROCEDURAL HISTORY

On April 28, 2016, the Board conducted a representation election among the bargaining unit employees of UniFirst Corporation ("UniFirst" or "Company"). Bargaining unit employees

voted on whether they wished to decertify the Union as their bargaining representative. The reported results were 51 votes for continued Union representation and 75 votes against.

On May 5, 2016, the Union filed timely objections, pursuant to its rights under the National Labor Relations Act ("Act") and in accordance with 29 C.F.R. § 102.69. On December 8, 2016, in Pittsburgh, Pennsylvania, the Region conducted an Objections Hearing ("Hearing") to determine the merits of the Union's objections. Hearing Officer Clifford E. Spungen ("Hearing Officer") conducted the Hearing. The Hearing Officer issued his Report on Objections ("Report") on December 28, 2016 recommending that the Union's objections be overruled. (Report, at 10.)

On January 11, 2017, the Union timely filed exceptions to the Report with the Regional Director. The Regional Director issued her decision on January 20, 2017, certifying the results of the election.

RELEVANT FACTS

On March 29, 2016, Homer J. Suman ("Petitioner") filed a petition for decertification among all of the bargaining unit employees[1] at the Company's facility in New Kensington, Pennsylvania. On April 28, 2016, Region 10 conducted a secret ballot election. The reported results were 51 votes for continued Union representation and 75 votes against. The Union filed timely objections to the Company's conduct during the critical period before the election, alleging that the conduct interfered with the employees' rights to a free and uncoereced election. On December 8, 2016, the Board conducted the Hearing in which the Union, the Company, and the Petitioner presented evidence. The following facts are drawn from the record of the hearing.

[1] The Union represented a wall-to-wall bargaining unit at the New Kensington facility, including production, stock room, maintenance, mechanical, and delivery employees.

1. **The Company unlawfully promised bargaining unit employees a 401(k) plan if they voted to decertify the Union. The Company made similar promises in a 2013 decertification election that the Board overturned.**

The Company held mandatory large group meetings between April 8 and 10, 2016. (Hearing Tr., Kraft, at 37, 56.) Peter Kraft ("Kraft"), the Company's Labor Relations Counsel conducted those meetings. Jim Lang ("Lang"), the General Manager who is in charge of the entire New Kensington facility, was present for all of these meetings. (Hearing Tr., Kraft, at 57-58.) Daniel Valenzuela ("Valenzuela"), the Company's Production Manager, was present for all but one of these meetings. (Hearing Tr., Kraft, at 57.) Chuck Mathews ("Mathews"), the Company's Sales Supervisor, was present at the meeting for the garage employees. (Hearing Tr., Kraft, at 57.) Kraft testified that most of the bargaining unit attended these meetings. (Hearing Tr., Kraft, at 59.)

Bargaining unit member Karen Bergman ("Bergman")[2] attended one of these meetings. (Hearing Tr., Bergman, at 63.) She testified that Kraft explained the purpose of the meeting was to discuss the "advantages" of decertifying the Union. (Hearing Tr., Bergman, at 63.) Bargaining unit members Kelly Sue Brenner ("Brenner"), Mary Ann Trozzo ("Trozzo"), and Toni DiGiacobbe ("DiGiacobbe") also attended this meeting.

Brenner testified that the purpose of the meeting was "to hear what the company had to offer us if we weren't in the Union." (Hearing Tr., Brenner, at 103.) Brenner further testified that the Company told her she had to sign the disclaimer[3] or she "couldn't hear what the company had to

[2] Bergman is the Recording Secretary and Unit Chairperson for the Local. (Hearing Tr., Bergman, at 61-62.)
[3] The disclaimers or "participation statements" signed by bargaining unit employees were presented to evidence as Union Exhibit 6 during the Hearing. These disclaimers provide:

> #1. I want to learn information about UniFirst's non-union wages, benefits, and policies.
> #2. By reading about or listening to such information, it is not being offered or promised to me based on the Union being voted out.

offer." (Hearing Tr., Brenner, at 103.) Brenner further testified that, in response to a question about 401(k) plans and pension plans[4], the Company replied that bargaining unit employees could put their union dues towards the 401(k) plan offered by the Company in the event of decertification. (Hearing Tr., Brenner, at 106.) Brenner understood from the meeting that this would only work "if there was no Union. You had to be company to get 401(k)." (Hearing Tr., Brenner, at 106.) The Company also explained that, "[t]he 401(k) would be better than your pension because you can take money out." (Hearing Tr., Brenner, at p. 106-107.)

Trozzo also attended this meeting (Hearing Tr., Trozzo, at 117.) Trozzo testified that Kraft "said that if we put our Union dues to the 401(k), we could do that." (Hearing Tr., Trozzo, at 118.) Kraft did not mention that the Union could bargain for a 401(k) plan. (Hearing Tr., Trozzo, at 118.) DiGiacobbe, who was also present, testified that Kraft stated, "we could take the Union dues that we would have paid and put that into a 401(k)." (Hearing Tr., DiGiacobbe, at 169.)

In addition to the large group meetings, the Company held small group meetings with employees between April 18 and April 22, 2016. (Hearing Tr., Kraft, at 45.) Kraft conducted these meetings. In preparation for these meetings, Kraft created a list of the Company's non-union benefits.[5] Kraft also created a list[6] of employee benefits under the collective bargaining agreement ("CBA[7]"). According to his testimony, Kraft "went in sequence," using the lists to describe the difference in benefits between the Company's union and non-union facilities. (Hearing Tr., Kraft, at 49.)

#3. All UniFirst non-union wage rates, benefits, and policies I have asked to learn about are obtainable through collective bargaining. So voting the Union out is not my only option for getting any or all of UniFirst's non-union wage rates, benefits, or policies.

[4] Bargaining unit employees have a pension, but not a 401(k) or profit sharing plan. (Hearing Tr., Bergman, at 62.)

[5] This list was presented into evidence as Union Exhibit 8 during the Hearing.

[6] This list was presented into Evidence as Union Exhibit 10 during the Hearing.

[7] The CBA was presented into evidence as Union Exhibit 11 at the Hearing.

Bargaining unit member George Sweatt ("Sweatt") attended two of these small group meeings. (Hearing Tr., Sweatt, at 136.) He testified that the company stated that "because the Union was there that the company's hands were tied to pursue certain things [like benefits and wages]," and that the Company was "unable to pursue those issues because the Union was basically keeping them from doing that because of the contract and the agreement that they already had made." (Hearing Tr., Sweatt, at 140.)

The Company engaged in very similar behavior during a past decertification election held at the New Kensington facility in 2013. During that election, the Company's Senior Vice President "told employees to trust him, vote no, and take their union dues and put them into the Employer's 401(k) plan." *UniFirst Corp.*, 361 NLRB No. 1, fn. 3 (2014).[8] The Board held that, "[w]e agree with the hearing officer that the Employer's statements are objectionable because they would lead employees to reasonably believe that the Employer was promising these benefits if they decertified the Union." *Id.* at fn. 7 (citing *G & K Services*, 357 NLRB No. 109 (2011).

2. The Company unlawfully promised bargaining unit employees that nothing would change for the worse if they voted to decertify the Union, specifically promising that the discipline policy would remain the same.

As described above, Bergman attended one of the large group meetings held by the Company. Bergman testified that at that meeting, Kraft "said that the disciplinary policy would be no different from the contract to the UniFirst policy" and that "the disciplinary policy was no different than at other facilities than what we had in our contract." (Hearing Tr., Bergman, at 64.) Trozzo, who also attended the meeting, testified that, "Mr. Kraft said that it [the Company] would not change disciplinary action. It is the same as it is in a non-Union facility." (Hearing Tr., Trozzo, at 120.) DiGiacobbe corroborated that Kraft told the bargaining unit employees in the

[8] This decision was entered into evidence as Union Exhibit 2 during the Hearing.

meeting she attended that "[m]ost things wouldn't change if we went non- Union. The grievance process would be the same." (Hearing Tr., DiGiacobbe, at 169.)

3. The Company unlawfully threatened bargaining unit employees that it could change the language in the CBA at any time.

The Company also told bargaining unit employees that it could change the language in the CBA. Bergman testified that Kraft stated at the meeting she attended, "that the company . . . could make changes in the contract and he gave the health insurance as an example." (Hearing Tr., Bergman, at 65.) She reiterated: "[Kraft] said the company had the right to change things in the contract." (Hearing Tr., Bergman, at 99.) Trozzo also testified: "Mr. Kraft said that he – that they could change the language in the contract." (Hearing Tr., Trozzo, at 120.) DiGiacobbe corroborated that Kraft said "the company could change the language in the contract at any time they wanted." (Hearing Tr., DiGiacobbe, at 170.)

Kraft testified that he told bargaining unit employees that not all of the provisions in the CBA are guaranteed. After Bergman stated in a meeting that the Company could change the employee handbook, Kraft responded that, "[t]here are provisions in the contract that aren't guaranteed either, not the entire thing. I said, there are provisions in it in discreet [sic] places where the company – where there's no guarantee there." (Hearing Tr., Kraft, at 196.)

4. The Company unlawfully changed and disparately enforced its information sharing policy.

The Company maintained a number of bulletin boards prior to the filing of the decertification petition. There were two Union bulletin boards; the first is located in the lunchroom and the second is located in the upstairs stock room by the time clock. (Hearing Tr., Bergman, at 68.) There were also two Company bulletin boards located right beside the Union

bulletin boards. (Hearing Tr., Bergman, at 68.) The Company did not allow employees to post on the Company bulletin boards. (Hearing Tr., Bergman, at 69.)

On April 18, 2016, ten days before the election, the Company decided to create two new bulletin boards for employees, the first in the cafeteria and the second in the upstairs break room. (Hearing Tr., Kraft, at 24.) Kraft testified that he was involved in the decision to create the new bulletin board. (Hearing Tr., Kraft, at 26.) The Company posted a document on the bulletin board in the cafeteria on April 18, 2016. (Hearing Tr., Kraft, at 25; Trozzo, at 121.) The document[9] stated: "This is an Employee Bulletin Board. There is a second one in the Break Room upstairs[.] People can post flyers, letters, and writings about the NLRB election here. Postings about the NLRB election or other subjects in other places (doors, bathroom walls, other Company bulletin boards) is [sic] not allowed. Note: the Union controls what is posted on their two bulletin boards."

Bergman and DiGiacobbe testified that Kraft also held a meeting in the stock room to announce that the Company had instituted the new employee bulletin boards. (Hearing Tr., Bergman, at 69; DiGiacobbe, at 171.) Bergman further testified that "[t]he following day, the employee bulletin board was filled with anti-Union flyers and papers." (Hearing Tr., Bergman, at 69.) The Company removed the employee bulletin boards the day after the bargaining unit employees voted to decertify the Union. (Hearing Tr., Bergman, at 71.; Trozzo, at 121.) The Company provided no explanation as to why it was removing the employee bulletin boards. (Hearing Tr., Bergman, at 71.)

ARGUMENT

When considering objections to representation elections, the Board's primary goal is to ensure that employees are provided "a laboratory in which an experiment may be conducted,

[9] This document was entered into evidence as Union Exhibit 3 at the Hearing.

under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees." *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003) (citing *General Shoe Corp*., 77 NLRB 124 (1948)). The Board has also stated that "[t]he fundamental purpose of a Board election is to provide employees with a meaningful opportunity to express their sentiment concerning representation for the purpose of collective bargaining." *Lemco Construction Inc*., 383, NLRB 459, 460, (1987). If pre-election conduct interferes with the laboratory conditions under which employees vote, the results of a representation election should be set aside and a new election should be ordered.

The Board uses a different test than the standard it uses in unfair labor practice ("ULP") cases when determining whether employer conduct is objectionable. Conduct that may not rise to the level of a Section 8(a)(1) violation of the Act may still serve as grounds for setting aside the results of an election. *General Shoe Corp*., 77 NLRB 124. The Board looks at a number of factors in determining whether pre-election conduct should lead to setting aside the results, including the number of incidents and their severity; how many bargaining unit members were exposed to the conduct; how likely the conduct was to cause fear among bargaining unit members; how soon the conduct occurred before the election; and the degree to which the conduct persists or sticks out in the minds of bargaining unit employees. *Avis Rent-a-Car System*, 280 NLRB 580, 581 (1986). In *NLRB v. Gissel Packing Co*. 395 U.S. 575, 618-19 (1969), the Supreme Court ruled that in evaluating allegations of employer misconduct and unlawful threats, the Board must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id*. at 617.

Despite the Regional Director's conclusions to the contrary, the evidence presented at the Hearing established that there were multiple occurrences of misconduct, most of which the entire bargaining unit was exposed to. Upper management made promises and threats to bargaining unit employees, while the Company instituted policy changes affecting communication around the upcoming election. The Company's unlawful conduct interfered with the bargaining unit employees' ability to exercise their free choice.

1. The Company unlawfully interfered with the election by promising bargaining unit employees a 401(k) plan if they voted to decertify the Union.

As the Hearing Record indicates, the Company unlawfully promised bargaining unit members a 401(k) plan if they voted to decertify the Union. An employer cannot make explicit or implied promises that employees will receive improved benefits if they decertify. *Unifirst Corp.*, 346 NLRB at 593. "Determining whether a statement is an implied promise of benefits involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise that benefits would be adjusted if the union were voted out." *NTN Bower Corp.*, 2014 WL 7149610, Case 10-RD-105644 (Dec. 15, 2014) (citing *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983)).

Here, three bargaining unit members testified that the Company told them they could put their dues money towards a 401(k). (Hearing Tr., Brenner, at 106; Trozzo, at 118; DiGiacobbe, at 169.) The Company engaged in very similar behavior in a prior decertification election at the same facility. In that case, the Board ordered a new election when a Company representative told employees "to trust him, vote no, and take their union dues and put them into the Employer's 401(k) plan." *Unifirst Corp.*, 346 NLRB 591 at fn. 3. The Company used almost identical

language here, telling employees that they "could take the Union dues that [they] would have paid and put that into a 401(k)." (Hearing Tr., DiGiacobbe, at 169.)[10]

The Regional Director's Decision dismisses this objection on the grounds that Bergman, who the Hearing Officer credited, did not testify as to the Company's promise of a 401(k) plan. (Decision, at 3.) However, the Regional Director did not address the testimony of three employees that the Company made almost identical statements during the critical period of this election as they had in 2013. The Company's implied promise of a 401(k) plan merits the holding of a new election, as the Board found in the 2013 decertification election at the same facility.

2. The Company unlawfully interfered with the election by promising bargaining unit employees that nothing would change for the worse and that, specifically, the Company's disciplinary policy would remain the same if they voted to decertify the Union.

As the Hearing Record indicates, the Company unlawfully promised bargaining unit employees that the Company's disciplinary policy would remain the same if they voted to decertify the Union. As Bergman testified, Kraft "said that the disciplinary policy would be no different from the contract to the UniFirst policy" and that "the disciplinary policy was no different than at other facilities than what we had in our contract." (Hearing Tr., Bergman, at 64.) The Regional Director's Decision dismissed this objection, stating that Kraft's statements were in response to a unit employee's concern of failing to meet the Company's production quota, which the Company also maintains at non-unit plants. (Decision, at 5.) However, Bergman simply testified that the issue of discipline *arose* because another employee was worried about

[10] The Hearing Officer distinguished the instant case, finding that "the Union has provided no evidence of such specific or explicit promise of benefit." (Report, at 6.) However, the Company used almost identical language in both cases. Moreover, such promises need not be explicit to merit overturning an election; employers are prohibited from making implied promises as well.

the consequences of not reaching her production quota. (Hearing Tr., Bergman, at 82-83.) This context does not negate the fact that the Company "said that the disciplinary policy would be no different from the contract to the UniFirst policy" and that "the disciplinary policy was no different than at other facilities than what we had in our contract." (Hearing Tr., Bergman, at 64.) Moreover, two other employees corroborated that Kraft explicitly and unambiguously promised that "[the Company] would not change disciplinary action" and that "[m]ost things wouldn't change if we went non-Union. The grievance process would be the same." (Hearing Tr., Trozzo, at 120; DiGiacobbe, at 169.) These unlawful promises merit the holding of a new election.

3. The Company unlawfully interfered with the election by threatening bargaining unit employees that it could change the language of the CBA at any time.

As the Hearing Record indicates, the Company unlawfully threatened bargaining unit employees that it could change the CBA language at any time. The Regional Director's Decision dismisses this objection, finding that the Company referred to provisions of the CBA that it could, in fact, change. (Decision, at 6.) However, Bergman testified that " . . . [Kraft] also told us that the company had the – they could make changes in the contract, and he gave the health insurance *as an example*." (Hearing Tr., Bergman, at 65, emphasis added.) That the Company claimed it could make any changes to the contract, and then provided a provision that it actually *could* change, only strengthens this threat. Trozzo and DiGiacobbe both corroborated Bergman's testimony that Kraft stated the Company could change the CBA language generally at any time. (Hearing Tr., Trozzo, at 120; DiGiacobbe at 170.) Contrary to the Regional Director's Decision, the Company did not truthfully point to provisions of the CBA that it could unilaterally alter. Rather, the Company used these provisions as an example to bolster its general threat that it could change the CBA at any time, suggesting that the CBA's protections were meaningless.

These threats were particularly effective when much of the "vote yes" campaign in favor of continued Union representation hinged on the fact that the CBA guaranteed certain benefits and procedures, whereas without a contract the Company could change benefits and polices at any time.[11] The Company undermined the entire "vote yes" campaign by falsely claiming that the terms of the CBA were changeable at the Company's whim. These threats merit the holding of a new election.

4. The Company unlawfully interfered with the election by changing and disparately enforcing its information sharing policy.

As the Hearing Record indicates, the Company unlawfully changed and disparately enforced its information sharing policy when it unilaterally installed two new bulletin boards ten days before the election and then removed them without comment the day after the election. The Regional Director's Decision dismissed this objection, finding that " . . . the Union did not present any evidence that the Union objected to the Employer's decision to repurpose two bulletin boards so that employees could post election related materials on these bulletin boards." (Decision, at 7.) However, the Union is not required to object to a unilateral change for that change to merit the holding of a new election. Prior to the Company's unilateral change to its information posting policy, the only bulletin boards available were the Company boards (which employees were prohibited from using) and the Union boards. Bergman testified immediately after installation of the new employee bulletin boards, they were "filled with anti-Union flyers and papers." (Hearing Tr., Bergman, at 69.) By providing the new bulletin boards, the Company allowed anti-union material to be seen by the entire bargaining unit shortly before the election. This unilateral change merits the holding of a new election.

CONCLUSION

[11] *See* Employer Exhibit 2, which contains "vote yes" and "vote no" flyers. *See also* Hearing Tr., Kraft, at 196.

During the critical period the Company made implied and express promises to the bargaining unit employees. The Company also falsely claimed that it could change the CBA language, and unilaterally changed its information posting policy. Therefore, the Board should grant review and order a new election.

Respectfully submitted,

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Dated: February 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Union's Request for Review and Recommendation to Grant Objections to Election and Order a New Election was filed electronically with the NLRB, using the NLRB e-filing system, and electronic copies were sent to the following parties via e-mail on this 3d day of February 2017:

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